(27,493)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 254.

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND VEHICLE CORPORATION, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. FLYNT, SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA, AND D. A. STAFFORD, SHERIFF OF GUILFORD COUNTY, NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 19, 1920.

1 Eleventh District.

No. 355.

MOTORS CORP. et al.

against

SHERIFF OF FORSYTH COUNTY.

(From Forsyth.)

Before Bryson, J.

Plaintiff appealed.

Summons for Relief.

FORSYTH COUNTY:

In the Superior Court.

BETHLEHEM MOTORS CORPORATION, W. IRVING YOUNG & CO., INC., and THE LIBERTY MOTORS CORPORATION

against

GEORGE W. FLYNT, Sheriff of Forsyth County, North Carolina.

THE STATE OF NORTH CAROLINA:

To the Coroner of Forysth County, Greeting:

You are hereby commanded to summon George W. Flynt, sheriff of Forsyth County, North Carolina, the defendant above named, if he be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Forsyth at the courthouse in Winston-Salem, on the fourteenth Monday after the First Monday of September, 1918, it being the 9th day of December, 1918, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county, within the first three days of said term; and let said defendant take notice that if he fails to answer the said complaint within the time required by law the plaintiff will apply to the court for relief demanded in the complaint.

2 Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court this 14th day of November, 1918.

C. M. McKAUGHAN,
Clerk of Superior Court,
By ERNEST TRANSOU,
Deputy C. S. C.

Endorsed on back.

Received November 15, 1918; served November 16, 1918, by reading within summons and delivering a copy of same, and copy of summons, complaint, affidavit, and restraining order to Geo. W. Flynt, sheriff.

W. N. DALTON,
Coroner Forsyth County.

J. E. ALEXANDER,
Plaintiff's Attorney.

Surety Bond.

We acknowledge ourselves bound unto George W. Flynt, Sheriff of Forsyth County, North Carolina, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff Bethlehem Motors Corporation et al., shall pay to the defendant all such costs as the defendant may recover of the plaintiffs in this action.

Witness our hand and seal this 14th day of November, 1918.

BETHLEHEM MOTORS CORP., [SEAL.]
By W. IRVING YOUNG & C.,
W. I. YOUNG,
President.
LIBERTY MOTORS CORP., [SEAL.]
By W. I. YOUNG,
President.
W. I. YOUNG. [SEAL.]

3 *Alias Summons for Relief.*

FORSYTH COUNTY:

In the Superior Court.

BETHLEHEM MOTORS CORPORATION, W. IRVING YOUNG & CO., INC., THE LIBERTY MOTORS CORPORATION, and NATIONAL MOTORS CO.

against

GEORGE W. FLYNT, Sheriff of Forsyth County, North Carolina, and D. A. STAFFORD, Sheriff of Guilford County, North Carolina.

THE STATE OF NORTH CAROLINA:

To the Sheriff of Guilford County, Greeting:

You are hereby commanded to summon D. A. Stafford, sheriff of Guilford County, North Carolina, the defendant above named, if he be found within your county, to be and appear before the judge of our superior court, at a court to be held for the county of Forsyth at the courthouse in Winston-Salem on the fourteenth Monday after the first Monday of September, 1918, it being the 9th day of Decem-

ber, 1918, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county within the first three days of said term; and let said defendant take notice that if he fails to answer the said complaint within the time required by law the plaintiffs will apply to the court for relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court this 15th day of November, 1918.

C. M. McKAUGHAN,
Clerk of Superior Court,
By WM. E. CHURCH,
Deputy C. S. C.

Endorsed on back.

Received November 1-6, 1918; served November 16, 1918, by reading within summons and delivering a copy of same and
4 copy of complaint, affidavit of C. W. Stevens, and restraining order to D. A. Stafford, sheriff of Guilford County.

GEO. L. STANBUREY,
Coroner Guilford County.

J. E. ALEXANDER,
Plaintiff's Attorney.

Bond on original summons to Forsyth County, N. C.

Complaint.

NORTH CAROLINA,
Forsyth County:

In the Superior Court, December Term, 1918.

BETHLEHEM MOTORS CORPORATION, W. IRVING YOUNG & CO., INC., THE LIBERTY MOTORS CORPORATION, et al.

against

GEORGE W. FLYNT, Sheriff of Forsyth County, North Carolina.

The plaintiffs allege:

1. That they are each corporations:

(*a*) The Bethlehem Motors Corporation is a corporation of the State of Pennsylvania, engaged in the manufacture of motors at Allentown, State of Pennsylvania, and in selling the products of its factories in interstate commerce.

(*b*) W. Irving Young & Co. is a corporation of the State of Delaware, engaged as sales agent and distributor of motors for the plaintiff Bethlehem Motors Corporation in the States of North and South Carolina and East Tennessee.

(c) The Liberty Motors Corporation is a North Carolina corporation, representing the business of W. Irving Young & Co. in the State of North Carolina, and having its principal place of business in the City of Winston-Salem, therein.

(d) W. Irving Young is the president of each, W. Irving Young & Co., Inc., and The Liberty Motors Corporation.

2. That the defendant, George W. Flynt, is and was at the times hereinafter referred to, the sheriff of Forsyth County, North Carolina.

3. That the defendant sheriff, on the 12th day of November, 1918, levied on, or attempted to levy on, one Bethlehem truck,
5 No. 2792, Model E, for the purpose of attempting to collect a tax of $500 from the plaintiff Bethlehem Motors Corporation; and has advertised the same for sale on November 22, 1918, at 12 o'clock a. m. (copy of the said sheriff's notice of levy and sale as served on W. Irving Young is hereto attached as Exhibit A). That said truck levied on and held by the defendant is worth $2,365, and is now in the place of business of The Liberty Motors Corporation, Winston-Salem.

4. The relation of the parties plaintiff is as follows:
The Bethlehem Motors Corporation and the National Motor and Vehicle Company are nonresident manufacturers of motors, selling them in the states named through W. Irving Young & Co., distributing agent; W. Irving Young & Co. sells only by sample car or truck and only at wholesale, taking orders from sample, and ordering them out from the factories of the said manufacturers; as stated W. Irving Young & Co. is the distributing agent for the plaintiffs Bethlehem Motors Corporation and National Motor and Vehicle Company for the states of North and South Carolina and East Tennessee. In North Carolina the business of W. Irving Young & Co. is conducted through the plaintiffs Liberty Motors Corporation and National Motors Corporation, which also do a retail agency sale business at Winston-Salem and Greensboro, North Calolina. All sales are from sample cars. That W. Irving Young & Co., Liberty Motors Comporation, and National Motors Corporation, act only as agents or distributors of cars for the said foreign manufacturers.

5. That the motor truck attached is a show or sample truck which has been bought and plaid for and is now and was before the 12th day of November, 1918, the property of W. Irving Young & Co., which is the sole owner thereof.

6. The plaintiffs are informed, advised and believe, and so allege, that the business in which they are engaged is one of interstate commerce; that the proposed tax is an attempted State burden thereon, and an unauthorized interference therewith, and is illegal
6 or invalid and that the sections of the act of the General Assembly of 1917, to wit: sections 72 and 87 of what is known as the Revenue Act of 1917, are discriminatory, invalid, and inoperative, and void in so far as the business of the plaintiffs is concerned.

That said section 72 discriminates between property owners in or citizens of North Carolina, and those of other states. That said sections of said act, as to these plaintiffs, are in violation of article 1, section 8, chapter 3, and of article 4, section 2, and of article 14, section 1 (amendments), of the Constitution of the United States of America, and are inoperative and void.

7. That an action has been begun as above in the Superior Court of Forsyth County.

Wherefore, plaintiffs demand judgment that defendant be enjoined from a sale of said truck, for restitution thereof, for costs, and for such other and further relief as may be just and proper.

J. E. ALEXANDER,
Attorney for Plaintiffs.

STATE OF NORTH CAROLINA,
County of Forsyth:

W. Irving Young, being duly sworn, says that he is president of W. Irving Young & Co., one of the foregoing plaintiffs; that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters stated on information and belief, and as to them he believes it to be true.

W. I. YOUNG.

Sworn to and subscribed before me this 14th day of November, 1918.

JNO. H. DYER,
Notary Public.

My commission expires May 21, 1920.

EXHIBIT A.

Sheriff's Sale.

The Bethlehem Truck Company, operated by W. I. Young & Co., agent, 517 North Liberty Street, Winston-Salem, North Carolina, having failed to pay his license tax for carrying on the busi-
7 ness of selling automobiles and automobile trucks, as provided in the Revenue Act of 1917, sections 72 and 87 of said revenue act, I levied on the following personal property belonging to the Bethlehem Truck Company by seizing a Bethlehem truck, No. 2792, Model E, the property of the Bethlehem Truck Company, which truck was located at 517 North Liberty street, in the City of Winston-Salem, North Carolina, which personal property will be sold for cash at the courthouse square in the City of Winston-Salem, on the 22d day of November, 1918, at 12 o'clock m., said property being sold to pay the license tax as an automobile dealer, as provided under the Revenue Act of 1917.

This the 12th day of November, 1918.

GEORGE W. FLYNT,
Sheriff.

Affidavit.

NORTH CAROLINA,
Forsyth County:

In the Superior Court, November Term, 1918.

(Title of Cause.)

Now comes C. W. Stevens, who being duly sworn says he is office manager of the plaintiff W. Irving Young & Co. and Liberty Motors Company and authorized to act in the absence of their president, W. Irving Young, who is absent. That since the seizure of the truck in Forsyth County for the tax in controversy, as affiant is informed, advised, and believes, D. A. Stafford, sheriff of Guilford County, has siezed a truck in Guilford County for the same tax from the National Motor Company, which is the local representative in Greensboro of the plaintiff W. Irving Young & Co. and Bethlehem Motors Company, and threatens to sell said truck for the same tax.

Wherefore, affiant for the plaintiffs asks that the said D. A. Stafford, sheriff, be likewise enjoined, and that the said National Motor Company and said sheriff be made parties to this action, and for such other and further relief as may be just and proper.

C. W. STEVENS.

8 Sworn to and subscribed before me this 15th day of November, 1918.

ERNEST TRANSOU,
Deputy C. S. C.

Filed November 15, 1918.

ERNEST TRANSOU,
Deputy C. S. C.

Order.

NORTH CAROLINA,
County of Forsyth:

In the Superior Court, December Term, 1918.

(Title of Cause.)

This cause coming on to be heard and being heard upon the duly verified complaint considered as an affidavit, and upon another affidavit filed in the cause, and it appearing that since the seizure by the sheriff of Forsyth County of a truck to satisfy the tax in question, the sheriff of Guilford County has also seized a truck in that county from the National Motor Company; now, on motion of J. E. Alexander, attorney for the plaintiffs, it is ordered and adjudged inasmuch as it appears that the two seizures and threatened sales relate to the same subject-matter and in order to prevent the multiplicity of suits concerning the same, that the National Motors Company be set down as party plaintiff to this action, and that D. A. Stafford, sheriff

of Guilford County, North Carolina, be made party defendant to this action, and that summons issue to the county of Guilford for the said D. A. Stafford, sheriff, aforesaid.

And it is further ordered that the said defendants, George W. Flynt, sheriff of Forsyth County, and D. A. Stafford, sheriff of Guilford County, show cause before the undersigned at Rockingham County courthouse, Wentworth, N. C., on the 30th day of November, 1918, at 1 o'clock p. m., or as soon thereafter as counsel may be heard, why they should not release the trucks seized and levied on and why they should not be permanently enjoined from making sales thereof, and why the prayer of the plaintiffs, as set out in their complaint, should not be granted, and further, that the plaintiffs have leave to file an amended complaint.

9 And in the meantime, the defendants, George W. Flynt, sheriff, and D. A. Stafford, sheriff, are enjoined from selling or disposing of the trucks and property in question and levied on.

At Winston-Salem, North Carolina, this November 15, 1918.

HENRY P. LANE,
Resident Judge, 11th Judicial District.

Filed November 16, 1918.

ERNEST TRANSOU,
Deputy Clerk Superior Court.

Answer.

NORTH CAROLINA,
Forsyth County:

In the Superior Court, December Term, 1918.

(Title of Cause.)

The defendant, George W. Flynt, sheriff, answering the complaint filed in this cause, says:

1. That article (*a*) of the first paragraph of said complaint is true, except that the defendant denies that the selling of the products of its factories is being done by order through interstate commerce.

That articles (*b*), (*c*), and (*d*) of the first paragraph of the complaint are true.

And further answering paragraph 1 of the complaint this defendant avers that the Liberty Motors Corporation and W. Irving Young & Co., Inc., have both jointly and severally at and prior to the alleged levy and seizure by the defendant of the Bethlehem Motor truck described in the complaint, said companies were offering and had sold numbers of the Bethlehem trucks, not by sample and order, as alleged in the complaint, but were selling the same from its warehouse or storage room on Liberty street, Winston-Salem, North Carolina, and that they have now and had then stored in their warehouse

Bethlehem trucks for the purpose of sale and delivery in Winston-Salem, North Carolina.

2. That paragraph 2 of the complaint is true.

3. That paragraph 3 is admitted, except the defendant does not know the value of the truck levied on.

4. That this defendant has not knowledge, information or belief as to matters alleged in paragraph 4 of the complaint, and therefore demands strict proof of the same; and he avers that all of the plaintiffs mentioned in the complaint have combined together and are offering for sale in unbroken packages and without previous or single orders the Bethlehem motor truck and other automobiles to any and all parties who come to their place of business, where the said Bethlehem motor trucks and other cars are offered for sale without previous orders by sample, but are buying and selling the Bethlehem motor truck and other cars already located in their place of business, just as other automobile companies are doing throughout the State of North Carolina, without first paying the license tax required under the Revenue Act of the State of North Carolina, passed by the Legislature of 1917.

5. As to matters alleged in paragraph 5 of the complaint the defendant has not knowledge or information sufficient to form a belief as to matters therein alleged and the same are, therefore, denied. And further answering said paragraph this defendant avers that he went to the place of business of the Liberty Motors Corporation, in the City of Winston-Salem, N. C., for the purpose of levying on some of its property to force the payment of the license tax aforesaid and found there W. Irving Young, the president thereof, and informed him that he, this defendant, had come for the purpose of levying on some of the property aforesaid of said corporation and forcing the payment of the license tax aforesaid, and at the request of the said W. Irving Young, President, levied upon the Bethlehem motor truck described in the complaint, and the same being pointed out to this defendant by the said W. Irving Young as the property of the Liberty Motors Corporation.

6. The defendant, answering paragraph 6 of the complaint, says that he has been advised, believes and alleges that the act of the Legislature of 1917, referred to as the Revenue Act, and that sections 72 and 87 thereof are valid and not in violation of the Constitution of the United States or that of North Carolina, and that the plaintiffs are liable for the tax therein specified; and each and every article in said paragraph inconsistent herewith and not herein admitted are denied.

7. That paragraph 7 of the complaint is admitted.

The defendant, George W. Flynt, sheriff, further answering the complaint of the plaintiffs, says:

1. That the plaintiffs have been for some time buying and storing in its warehouse on Liberty street, numbers of trucks and automobiles, and that all sales that have been heretofore made by them have been made in the City of Winston-Salem, after the trucks and motor cars have been stored by the plaintiffs in the warehouse of the plaintiffs; that said sales have not been made by sample, but have been made by the plaintiffs or their agents upon inspection and trial and by the purchasers selecting from the stock the cars purchased, which have been stored in the plaintiffs' warehouse on Liberty street, Winston-Salem, North Carolina; and this defendant is further informed, believes, and alleges that the plaintiffs have now in their warehouse on Liberty street, numbers of the Bethlehem motor trucks and other automobiles, and are making sales of the same as rapidly as they can, without procuring license, as required under the Revenue Act of 1917, and in violation of the law.

JONES & CLEMENT,
Attorneys for Defendant.

George W. Flynt, sheriff, being duly sworn, says the facts set forth in the foregoing answer are true of his own knowledge as therein stated, except as to those matters stated on information and belief, and as to these he believes it to be true.

GEORGE W. FLYNT.

12 Sworn and subscribed to before me this the 3d day of January, 1919.

C. M. McKAUGHAN,
Notary Public.

Filed January 3, 1919.

C. M. McKAUGHAN,
Clerk Superior Court.

Answer of D. B. Stafford.

NORTH CAROLINA,
Forsyth County:

In the Superior Court, December Term, 1918.

(Title of Cause.)

The defendant D. B. Stafford, sheriff, answering the complaint filed in this cause, says:

1. He admits paragraph 1 of the complaint and avers that the Liberty Motors Corporation, at and prior to the time of the levy alleged to have been made by the defendant herein on the Bethlehem truck described in the complaint, was offering for sale and had sold certain of the Bethlehem trucks, such as was seized and levied on in this action.

2. That paragraph 2 of the complaint is admitted.

3. That paragraph 3 of the complaint is admitted, except the defendant does not know the value of the truck levied on.

4. That the defendant has not knowledge or information sufficient to form a belief as to matters alleged in paragraph 4 of the complaint, but he avers that the Liberty Motors Corporation of Winston-Salem, North Carolina, is liable for the license tax as indicated in the Revenue Act of 1917.

5. Defendant denies any knowledge or information in regard to the allegations in paragraph 5 of the complaint sufficient to form a belief.

6. The defendant, answering paragraph 6 of the complaint, says that he has been advised, believes and alleges that the act of the Legislature of 1917, referred to as the Revenue Act, and that sections 72 and 87 thereof, are valid and not in violation of the Constitution, and that the plaintiffs are liable for the tax therein
13 specified; and each and every article in said paragraph inconsistent herewith, and not herein admitted, is denied.

7. That paragraph 7 of the complaint is admitted.

Wherefore, defendant having answered plaintiff's complaint filed herein as fully as he is advised it is his duty to do, prays that he go without day, and that said action be dismissed, and that he recover his cost to be taxed by the clerk.

BROOKS, SAPP & KELLY,
Attorneys for Defendant.

NORTH CAROLINA,
Guilford County:

D. B. Stafford, first being duly sworn, deposes and says that he is one of the defendants herein; that he has read the foregoing answer, and that same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those, he believes it to be true.

D. B. STAFFORD.

Sworn to and subscribed before me this 9th day of January, 1919.

[Official Seal.] ANDREW JOYNER, JR.,
Deputy Clerk Superior Court.

Filed February 10, 1919.

ERNEST TRANSOU,
Deputy C. S. C.

Findings of Facts and Order.

NORTH CAROLINA,
Forsyth County:

In the Superior Court, May Term, 1919.

BETHLEHEM MOTORS CORPORATION, W. IRVING YOUNG & Co., Liberty Motors Corporation, National Motors Corporation, and The National Motor and Vehicle Company

against

GEORGE W. FLYNT, Sheriff of Forsyth County, N. C., and D. A. STAFFORD, Sheriff of Guilford County, N. C.

This cause coming on to be heard and being heard at May Term, 1919, of Forsyth County Superior Court, before his Honor,
14 T. D. Bryson, judge, on a restraining order heretofore issued by his Honor Henry P. Lane, returnable before Judge T. D. Bryson, and continued until now, and now being heard on the pleadings and affidavits filed, the Court thereupon finds the following facts:

1. That the Bethlehem Motors Corporation is a corporation and is engaged in manufacturing automobile trucks at Allentown, Pa.; that the National Motor and Vehicle Company is a corporation and manufacturers of automobiles at Indianapolis, Ind. That each and both of said corporations distribute the products of their factories in the states of North Carolina, South Carolina and East Tennessee through W. Irving Young & Co., a corporation of the State of Delaware, whose said business in the State of North Carolina is conducted by the Liberty Motors Corporation and the National Motors Company, each and both corporations of the State of North Carolina.

2. The method of distributing the said trucks and cars is as follows:

The trucks are manufactured at Allentown, Pa., and the cars at Indianapolis, Ind., and from the factories in said states shipped by freight into the state of North Carolina.

That the said trucks and cars are shipped by the manufacturers to the Liberty Motors Corporation, doing business in the City of Winston-Salem, N. C., and to the National Motors Corporation, doing business in the City of Greensboro, State of North Carolina, both of which corporations thereupon were and became the agents of Bethlehem Motors Corporation, W. Irving Young & Co., and National Motor Vehicle Company for the purpose of selling and delivering said trucks and automobiles.

That the said trucks and automobiles so consigned to the Liberty Motors Corporation and National Motor Company are sold direct

by the Liberty Motor Corporation and the National Motor Company from their storage warehouse, and are consigned to them for that purpose and not to be used exclusively as samples or for
15 demontration purposes, but the Court finds from the testimony that purchasers solicited by the Liberty Motors Corporation and National Motor Company, the cars and trucks on hand used for demonstration and sales made thereof direct from the warehouse or storage building of the said Liberty Motors Corporation and National Motor Company within the State of North Carolina, and that the said motors and automobiles so consigned to them are not used or intended to be used simply for the purpose of soliciting orders to be filled by shipment from the plant of Bethlehem Motors Corporation and National Motor and Vehicle Company.

3. That Pursuant to the provisions of section- 72 and 87 of the Revenue Act of 1917, of North Carolina, the said manufacturers not having paid the tax provided for therein, the sheriff of Forsyth County levied on one National Car, product of the National Motor and Vehicle Company of Indianapolis, Ind., and the sheriff of Guilford County levied on one Bethlehem truck, product of the Bethlehem Motors Corporation of Allentown, Pa., and threatened to sell same for said taxes.

4. At the time of said levy the said National car was in the place of business of W. Irving Young & Co., and the Liberty Motors Company in the City of Winston-Salem, North Carolina, and the Bethlehem truck levied on by the sheriff of Guilford County was in the place of business of the National Motors Corporation, at Greensboro, North Carolina.

5. While it may appear in the pleadings and other papers in the case that the two sheriffs each levied on a Bethlehem truck, in order to facilitate the case and avoid unnecessary expense therein, it is agreed that the levy made by the sheriff of Forsyth County shall relate to a National car in substitution for the Bethlehem truck, and the levy in Guilford County to a Bethlehem truck as fully and as to the same extent as if actually seized.

And by consent it is ordered that the National Motor and Vehicle Company be set down as a party plaintiff, and that all the parties plaintiff adopt the complaint filed in this cause.

6. Counsel for plaintiffs and defendants have agreed on
16 findings of facts in Nos. 1, 3, 4, and 5 herein; they have not agreed on the findings in No. 2 herein which is made by the Court.

On the foregoing findings the Court is of the opinion and so holds that the plaintiffs, Bethlehem Motors Corporation and National Motor and Vehicle Company are manufacturers of automobiles and trucks, engaged through their agent, W. Irving Young & Co. and the Liberty Motors Corporation and National Motors Cor-

poration is in business of selling the same in the State of North Carolina.

That as said manufacturers of automobiles and trucks they are subject to a license tax provided by section 72, chapter 231, Public Acts of 1917.

That said tax has not been paid as provided by law. That the General Assembly, by the use of words, "Manufacturers of automobiles" intended to include thereby motor propelled trucks, and that the trucks mentioned in the pleadings fall within the meaning of section 72, chapter 231, Acts of 1917.

Upon the foregoing findings of facts and conclusions of law it is considered, ordered, and adjudged, that the restraining orders herein issued as against George W. Flynt, high sheriff of Forsyth County, North Carolina, and D. A. Stafford, high sheriff of Guilford County, North Carolina, restraining and enjoining them from advertising and selling the National car levied upon by sheriff of Forsyth County, and Bethlehem truck levied upon by sheriff of Guilford County, for the purpose of enforcing collection of said taxes, as provided for in section 72, chapter 231, Acts of 1917, be and the same is hereby vacated and dissolved, and that the said defendants, sheriffs of Forsyth and Guilford counties respectively, are hereby directed and ordered to proceed to collect the taxes so imposed, and to make sale of the said National car and the said Bethlehem motor truck levied upon by the said sheriffs of Forsyth and Guilford counties respectively, to enforce collection.

Done at chambers in Bryson City, N. C., where, by consent of parties, plaintiffs and defendants, this judgment was signed on this 10th day of June, 1919.

T. D. BRYSON,
Judge Holding Courts of the
11th Jud. Dist. of N. C.

17 The plaintiffs except to the second finding of facts and to the conclusions of law. Plaintiffs except to the judgment appearing in record and give notice of appeal to the Supreme Court. Notice of appeal accepted and further notice waived by defendants, appeal bond in the sum of $25 adjudged sufficient. By consent appellants allowed 30 days in which to make and serve statement of case on appeal to the Supreme Court, and appellees 30 days thereafter in which to file exceptions or serve counter-case on appeal.

T. D. BRYSON,
Judge Holding Courts of
11th Jud. Dist. of N. C.
C. M. McKAUGHAN,
Clerk Superior Court.

Filed July 1, 1919.

Assignments of Error.

NORTH CAROLINA,
Forsyth County:

In the Superior Court.

(Title of Cause.)

The plaintiffs assign errors for that his Honor erred in holding as follows:

1. That the plaintiffs, Bethlehem Motors Corporation and National Motor and Vehicle Company are manufacturers of automobiles and trucks, engaged through their agent, W. Irving Young & Co. and the Liberty Motors Corporation and National Motors Corporation, is in business of selling the same in the State of North Carolina.

This assignment of error is for the failure of the Court to add the words "in interstate commerce," after the words "North Carolina," last above.

2. That as said manufacturers of automobiles and trucks they are subject to a license tax provided by section 72, chapter 23, Public Acts of 1917 (meaning the Public Laws of North Carolina).

3. That the General Assembly, by use of the words "manufacturers of automobiles" intended to include thereby motor propelled trucks and that the trucks mentioned in the pleadings fall
18 within the meaning of section 72, chapter 231, acts of 1917 (meaning the Public Laws of North Carolina).

4. For that the Court dissolved the restraining order.

5. For that the Court ordered and directed the defendant to "proceed to collect the taxes so imposed, and to make sale of the National car and the Bethlehem motor truck levied upon by the said sheriffs of Forsyth and Guilford counties respectively to enforce said collection."

6. For that the Court rendered the judgment set out in the record.

7. In not holding that the said section 72 of said North Carolina Revenue Act of 1917, was illegal and void and in contravention of article 1, section 8, chapter 3, of the Constitution of the United States of America, as attempting to regulate commerce between the states.

8. In not holding that the said section 72 of the said Revenue Act of 1917 was illegal and void as being in contravention of article 4, section 2 of the Constitution of the United States of America in denying to these plaintiffs privileges and immunities given to citizens or holders of property in and of the State of North Carolina and otherwise as set out in said section 72 of the said Revenue Act.

9. In not holding that said section 72 of the North Carolina Revenue Act of 1917 was illegal and void as in violation of article 14, section 1 (amendments) of the Constitution of the United States of America, in that said section 72 of said Revenue Act denies to these plaintiffs the equal protection of the laws.

10. In not holding that said section 72 of said Revenue Act as to these plaintiffs is discriminatory and void as in conflict with article 4, section 2, and article 14, section 1 (amendments) of the Constitution of the United States of America. The said act imposes a tax of $500 on nonresident manufacturers and on dealers, while the tax is remitted to $100 in case the manufacturer has at least
19 three-fourths of his capital invested in property in North Carolina or in the securities of the State or its subdivisions.

J. E. ALEXANDER,
Counsel for Plaintiff.

Case on Appeal.

NORTH CAROLINA,
Forsyth County:

In the Superior Court.

(Title of Cause.)

By consent the case on appeal shall consist of:

1. Summons to Forsyth County.
2. Summons to Guilford County.
3. Complaint and exhibit.
4. Affidavit of C. W. Stevens.
5. Restraining order of Judge Lane.
6. Answer of George W. Flynt.
7. Answer of D. A. Stafford.
8. Findings of facts and judgment of Judge Bryson.
9. Such assignments of error as may be filed.

This July 2, 1919.

J. E. ALEXANDER,
Attorney for Plaintiffs.
JONES & CLEMENT,
BROOKS, SAPP & KELLY,
Attorneys for Defendants.

Undertaking on Appeal.

FORSYTH COUNTY:

In the Superior Court, This 2d Day of July, 1919.

(Title of Cause.)

Whereas, on the 10th day of June, 1919, judgment herein was rendered against the plaintiffs, who appealed, and whereas, the appellants intend to appeal from said judgment to the Supreme Court, now, therefore, we, the plaintiffs as principals and W. I. Young of Forsyth County, and I. H. Young of Forsyth County, as sureties, undertake, pursuant to the statute, that the said appellants shall pay all costs and damages that may be awarded against the appellants on such appeal, not exceeding twenty-five dollars.

BETHLEHEM MOTORS CORP., AND ALL OTHER PLAINTIFFS,
By J. E. ALEXANDER,
Att'y for Plaintiffs.

W. I. YOUNG.
I. H. YOUNG,

Justification of Sureties.

FORSYTH COUNTY, *set:*

W. I. Young, being duly sworn, says that he is a resident of the State of North Carolina and worth double the sum specified in the above undertaking, over all his debts and liabilities, and exclusive of property exempt from execution.

W. I. YOUNG.

Sworn and subscribed before me this 2d day of July, 1919.
[Notarial Seal.] JNO. H. DYER,
Notary Public.

My commission expires May 21, 1920.

Clerk's Certificate.

NORTH CAROLINA,
Forsyth County:

In the Superior Court.

(Title of Cause.)

I, C. M. McKaughan, Clerk Superior Court for county aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record on file in this court in a case lately therein pending, entitled "Bethlehem Motors Corporation, and others, against George W. Flynt, Sheriff, et al.", or so much thereof as has been agreed by

counsel shall constitute record on appeal to the Supreme Court.

21 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in Winston-Salem, this the 7th day of July, A. D. 1919.

[Official Seal.] C. M. McKAUGHAN,
Clerk Superior Court.

22 Proceedings in Supreme Court of North Carolina.

Docket Entries.

Transcript of appeal from Superior Court of Forsyth County docketed in Supreme Court of North Carolina July 8, 1919; case argued October 21, 1919; opinion affirming judgment Superior Court delivered by Clark, Chief Justice, for the Court, November 5, 1919 as follows:

23 FORSYTH COUNTY:

Supreme Court of North Carolina, Fall Term, 1919.

#355.

BEHTLEHEM MOTORS CORPORATION et als.

v.

GEORGE W. FLYNT, Sheriff.

Appeal by Plaintiffs from Bryson, J., at Mat Term, 1919, of Forsyth.

It appears from the facts found by consent and from the admissions, affidavits and pleadings in the cause that the plaintiff, the Bethlehem Motors Corporation, is engaged in the manufacture of Bethlehem trucks in Pennsylvania and that of the other plaintiffs the National Motor and Vehicle Co. is engaged in the manufacture of the National automobile in Indiana; the W. Irving Young & Co. is a corporation of Maryland, that the Liberty Motors Corporation is incorporated in this State with its office in Winston and that the National Motor Co. is also incorporated in this State with its principal office in Greensboro. The two companies last named represent W. Irving Young & Co. as their agents at Winston and Greensboro.

Under authority of Laws 1917 ch. 231 sec. 72, the sheriff of Forsyth levied on a National Motor car and the sheriff of Guilford upon a Bethlehem truck for non-payment of the license tax for selling under above section. The plaintiffs sued out a restraining order against the sheriff of Forsyth from selling the Motor car and against the sheriff of Guilford from selling the Bethlehem truck. From the dissolution of said restraining order the plaintiffs appealed.

J. E. Alexander for Plaintiffs.
Jones & Clement for Defendant.
The Attorney General for the State.

CLARK, *C. J.*:

The facts being practically admitted, the real question before the Court is whether section 72 ch. 231 laws 1917 is constitutional.

As found by the Court, the trucks and automobiles consigned to the Liberty Motor Corporation and the National Motor Co. by the other plaintiffs are sold direct by such consignees from their storage warehouses in this State. They are consigned to them for that purpose and not to be used exclusively as samples or for demonstration purposes, and the court finds from the testimony that purchasers were obtained here by the said consignee companies, the cars and trucks on hand being used for demonstration and the sales
24 were made direct from their warehouses in this State.

Under such circumstances, the goods after reaching the storage warehouse in this State were not in interstate commerce. Sewing Machine Co. v. Brickell 233 U. S. 304. Again, where coal was mined in Pennsylvania and sent by water to New Orleans and sold on the open market on account of the mine owners in Pennsylvania; or even if the coal was not landed in New Orleans but was sold and transferred there to another vessel bound to a foreign port, the coal was intermingled with property in Louisiana and the sale was not an interstate transaction, Brown v. Houston 114 U. S. 622. There was no error in the exception that the Judge did not find that this was interstate commerce.

It is assigned for error that the words in the statute "Manufacturers of automobiles" do not include "motor trucks." The definition of automobile is given 28 Cyc. 24 as follows (which we think is correct): "An automobile in the sense in which the term has come to be commonly understood, is a motor vehicle, usually propelled by steam, electricity of gasoline, and carrying its motive power within itself. It falls within the appellation of 'carriage' and vehicle."

Said section 72 ch. 231 Laws 1917 imposed license taxes, on every manufacturer or other person engaged in the business of selling automobiles in this State. The question intended to be raised by this appeal is the constitutionality of the second proviso in that section. "Provided, further, that if the officer, agent or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz; bonds of the State of North Carolina or of any county, city or town of said State, or any property situated therein, and returned for taxation therein, the taxes named in this section shall be one-fifth of those named."

The plaintiffs allege that by reason of this proviso the Act was in violation of the Federal Constitution because:

25 I. It is in conflict with the Interstate Commerce clause Art. I, sec. 8 (3).

II. It is in conflict with Art. IV, sec. 2 in that it deprives them of the privileges and immunities of other citizens.

III. It is in conflict with sec. 1 of XIV Amendment in that it denies the plaintiffs the equal protection of the laws.

First. Sec. 72 is not obnoxious to the Interstate Commerce clause. In New York v. Roberts 171 U. S. 658 the Court says: "It must be regarded as finally settled by frequent decisions of this Court that, subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State."

In regard to the contention that the statute discriminated against foreign corporations, the Court said: "If the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that, obviously, such is not the purpose of this legislation. Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or county and doing business in this State * * * shall be liable to and shall pay a tax, as a tax upon its franchise or business into the State Treasury annually, to be computed as follows * * * It will be perceived that the tax is prescribed as well for New York Corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture, or mining ores, within the State of New York are exempted from this
26 tax; but such exemption is not restricted to New York Corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State."

In Brewing Co. v. Brister 179 U. S. 452 it was held that the exemption from tax on sales by the manufacturer in Ohio of intoxicating liquor of his own make was not an illegal discrimination against a foreign corporation which was taxed on sales of its liquor manufactured outside of the State and sold in Ohio.

Sec. 72 does not tax the plaintiffs or any of them by reason of the manufacture of automobiles but taxes only selling them in this State, after they arrive here and have become a part of the personal property in this State.

Second. Sec. 72 does not interfere with the privilege and immunities as citizens of the United States for it has always been held that the term "citizen" in Art. IV, sec. 2, U. S. Constitution which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" refers to natural persons only, members of the body politic, owing allegiance to the State and not to artificial persons created by the Legislature and possessing only such attributes as the legislature has prescribed.

Third. Sec. 72 does not deny the equal protection of the laws to the plaintiffs. While corporations are held to be persons within the equal protection and due process clauses of the XIV Amendment, they are not citizens within the privilege and immunities clause of that section. Western Turf Association v. Greenberg 204 U. S. 363. While probably no manufacturer of automobiles in another State could invest three fourths of all its assets in bonds of this State, or of any county, city or town of this State, sec. 72 does not deny the plaintiffs the equal protection of the law because it confers no benefit on any citizen of this State which is not equally conferred
27 upon a citizen of another State.

That part of the proviso which reduces the selling license tax from $500 to $100 upon the manufacturer who has invested at least ¾ of his entire assets in any property situated in this State, or in the bonds of this State and its counties and towns, is not in violation of the U. S. Constitution. When the Corporation is not created by this State nor doing business here under conditions that subject it to process issuing from our Courts, it is not within the provision of the XIV Amendment, Blake v. McClung 172 U. S. 260.

Indeed the provision is not discriminatory. In Armour v. Virginia 118 Virginia 242 the Court of that State sustained a statute imposing a license tax upon all merchants for the privilege of doing business but exempting manufacture-s who were already taxed in that State who were already taxed on their capital by that State and offered for sale at the place of manufacture, goods, wares, and merchandise manufactured by them. This was affirmed on writ of error Armour v. Virginia 246 U. S. 1 already cited. To same purport New York v. Roberts and Brewing Co. v. Brister, both cited supra. To same purpose, Sugar Refining Co. v. Louisiana 179 U. S. 89.

The contention of the plaintiffs may be summed up in the proposition that the State having laid a tax of $500 upon the business of selling automobiles in this State could not reduce the amount to $100 as to those persons or companies who have listed and paid taxes on three fourths of their property in this State. We think this provision does not violate any clause either of the State or Federal Constitution. Indeed in our State Constitution we have a very similar provision in Art. V, sec. 3: "The General Assembly may also tax trades, professions, franchises, and incomes provided no income shall be taxed when the property from which the income is derived is taxed." The object is to reduce the license tax for selling automobiles in this State in cases where such seller is already paying a tax to the State on three fourths of his assets.

Affirmed.

28 FORSYTH CO:

Supreme Court of North Carolina, Fall Term, 1919.

#355.

BETHLEHEM MOTORS CORPORATION, W. IRVING YOUNG & CO., INC., and THE LIBERTY MOTORS CORPORATION

versus

GEORGE W. FLYNT, Sheriff Forsyth County, and D. A. STAFFORD, Sheriff Guilford County.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court Forsyth County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the plaintiffs and surety do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-five 05/100 dollars ($35.05), and execution issue therefor.

29 *Petition for Writ of Error.*

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company.

VS.

GEO. W. FLYNT, Sheriff of Forsyth County, North Carolina, and D. A. STAFFORD, Sheriff of Guilford County, North Carolina.

To the Honorable Walter Clark,
Chief Justice of the Supreme Court of
North Carolina:

Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation and National Motors Company, plaintiffs in the above entitled cause, show by this Petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of North Carolina, the same being the highest court in said State, in which a decision could be had in this suit, manifest errors have occurred, greatly to the damage of the said Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation,

W. Irving Young & Company, Inc., The Liberty Motors Corporation and National Motors Company.

That, as appears in the record and proceedings, there was drawn in question the question as to whether or not a statute of said State of North Carolina, to wit: See 72 of the Revenue Act of North Carolina, being chapter 23 of the Public Laws of North Carolina, ratified the 6th day of March, 1917, as follows:

"Manufacturer of Automobiles.

Every manufacturer of automobiles engaged in the business of selling the same in this State, or every person or persons or corporation engaged in selling automobiles in this State, the manufacturer of which has not paid the license tax provided for in this section, before selling or offering for sale any such machine, shall pay to the State Treasurer a tax of $500.00 and obtain a license for conducting such business. Any applicant for a license shall furnish the State Treasurer with the names of every class or style of the machine offered for sale, with a written application for the license. The State Treasurer shall, upon the written application of any one who has obtained a license provided in this section and the payment of a fee of $5.00, issue a certified duplicate containing the name of the agent representing the holder of the license, which gives him the privilege of doing business as the agent of the holder of the license. Every one to whom license shall have been issued as provided in this section shall have power to employ an unlimited number of agents to sell only the machine designated in the license, upon the payment of the tax aforesaid. Each County may levy a tax of $5.00 upon each agent doing business in the County. It shall be the duty of the State Treasurer to have this section printed on the face of each license issued under this act, for the information and protection of the parties to whom the same may be issued; provided, that where the manufacturer or person or persons or corporation licensed to do business in this State as provided by this act employs one or more travelling representatives, such travelling representatives may do business in any County in which the manufacturer or person or persons or corporation employing such travelling representatives has paid the tax of $5.00 to the County as provided in this Act, and such travelling representatives shall not be required to pay any tax to the County: Provided further, that if any officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz: bonds of the State of North Carolina or of any County, city, or town of said State, or any property situated therein, and return for taxation therein, the taxes named in this section shall be one-fifth of those named. Provided further, that if, at the expiration of the state license issued under this section to any manufacturer or persons selling automobiles in the State, such license shall have been in force for less than six months, then upon a renewal of such license for the

following year, the manufacturer or person shall be allowed by the State Treasurer a rebate of ($250.00) Two Hundred and
31 Fifty Dollars on the new license."

(*a*) Whether said act was or was not in conflict with and in contravention of Article I, Section 8, Cl. 3, of the Constitution of the United States of America as follows:

"Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes."

(*b*) And further in conflict with and in contravention of Article IV, Section 2 of *of* said Constitution of the United States of America in denying to plaintiffs' petitioners privileges and immunities given to citizens or holders of property in and of the State of North Carolina and otherwise as set out in said section 72 of said Revenue Act.

(*c*) And further in conflict with and in contravention of Article XIV, Section I (Amendments) of the Constitution of the United States of America, denying to the plaintiffs the equal protection of the laws.

(*d*) And further in conflict with and in contravention of Article IV, Section 2 and Article XIV, Section I (Amendments) of the said Constitution of the United States of America, as denying to the plaintiffs citizens of States other than North Carolina, privileges and immunities granted by said act to citizens of said State of North Carolina, and abridging said privileges and immunities of the plaintiffs citizens of other States while conferring such privileges and immunities on citizens of said State of North Carolina, and in denying to the plaintiffs the equal protection of the laws.

(*e*) That said act is discriminatory between the plaintiffs, citizens of other States, and citizens of North Carolina, imposing a license tax of $500.00 yearly on plaintiffs while only $100.00 yearly on citizens on property holders in and of said State of North Carolina, as more fully appears in said Act.

(*f*) For it was not within the power of the State of North Carolina to enact said section 72, Chapter 23 Public Laws 1917; all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignments of error filed herewith.

32 Wherefore, petitioners pray that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which said appeal was rendered duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such court in such cases made and provided, and that the said be by the Honorable Court inspected and corrected in accordance with law and justice.

J. E. ALEXANDER,
DALLAS C. KIRBY,
(*Solicitors.*)

33 [Endorsed:] Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company vs. Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina. Petition. J. E. Alexander, Attorney and Counselor at Law, 8th Floor O'Hanlon Building, Winston-Salem, North Carolina.

34 BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company.

vs.

GEO. W. FLYNT, Sheriff of Forsyth County, North Carolina, and D. A. STAFFORD, Sheriff of Guilford County, North Carolina.

Assignments of Error.

Now comes the plaintiff in the above entitled cause and files the following Assignments of Error, upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 4th day of November, 1919.

I.

For that the Supreme Court of the State of North Carolina erred as follows:

It holding that the business of plaintiffs, as set out in the pleadings and facts found, was not one of the Inter-State Commerce and as such was the subject of taxation by Sec. 72, Chapt. 23, Revenue Act of North Carolina of 1917.

II.

In holding that said Section 72, Chapt. 23, Revenue Act of North Carolina was not illegal and void and in contravention of Article I, Section 8, Cl. 3 of the Constitution of the United States of America, as attempting to regulate commerce between the States.

III.

In not holding that the said section 72 of said Revenue Act of 1917 was illegal and void as being in contravention of Article IV, section 2, of the Constitution of the United States of America in denying to these plaintiffs privileges and immunities given to citizens or holders of property in and of the State of North Carolina and otherwise as set out in said section 72 of the said Revenue Act.

35 IV.

In not holding that said section 72 of the North Carolina Revenue Act of 1917 was illegal and void as in violation of Article XIV, Section 1 (Amendments) of the Constitution of the United States of America, in that section 72 of said Revenue Act denies to these plaintiffs the equal protection of the laws.

V.

In not holding that said section 72 of said Revenue Act as to these plaintiffs is discriminatory and void as in conflict with article IV, Section 2 and Article XIV, Section 1 (Amendments) of the Constitution of the United States of America. The said act imposed a tax of $500.00 on non-resident manufacturers and on dealers, while the tax is remitted to $100.00 in case the manufacturer has at least three-fourths of his assets invested in property in North Carolina or in the securities of the State or of its sub-divisions.

VI.

For that it was not in the power of the State of North Carolina to enact said section 72, chapt. 23 Public Laws 1917.

VII.

In rendering and signing the Judgment and Opinion set out in the Record.

Wherefore, the appellant prays that said appeal be reversed and that said Supreme Court of the State of North Carolina be ordered to enter a decree reversing the decision of the lower court in said cause.

J. E. ALEXANDER,
DALLAS C. KIRBY,
Attorneys for Appellants.

36 [Endorsed:] Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company vs. Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina. Assignments or Error. J. E. Alexander, Attorney and Counselor at Law, 8th floor O'Hanlon Building, Winston-Salem, North Carolina.

37 *Writ of Error and Order.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Walter Clark, Chief Justice of the Supreme Court of the State of North Carolina, and to the Associate Justices of the Court, Greeting:

Whereas, in the record and proceedings and in the rendition of a judgment of the above entitled cause, which said cause was before us at the Fall Term of the Supreme Court of North Carolina between Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation and the National Motors Company, and George W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina, this court being the highest court of the State of North Carolina, having jurisdiction of the cause, there was drawn in question, Article I, of America, relating to the regulation of commerce between the States; Article IV, section 2, of the Constitution of the United States of America, relating to the privileges and immunities of citizens or holders of property in and of the State of North Carolina; Article XIV, section I (Amendments) of the Constitution of the United States of America, which guarantees the people of the several states the equal protection of the laws, and Article IV, section 2, Article XIV, section I (Amendments) of the Constitution of the United States of America, all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignments of error filed herewith.

And whereas, there has been filed a Petition for Writ of Error alleging a manifest error in said decision to the damage of
38 Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Co., Inc., The Liberty Motors Corporation and National Motors Company, the petitioners in error; and whereas, we are willing that if there is error it should be duly corrected.

Therefore, on motion of J. E. Alexander and D. C. Kirby, Attorneys for the above named plaintiffs, it is hereby ordered that a Writ of Error be allowed upon bond being furnished by the plaintiffs, conditioned according to law in the sum of Five Hundred ($500.00) Dollars, and that a true copy of the record, assignments of error, and all proceedings in the case of the Supreme Court of North Carolina shall be transmitted to the Supreme Court of the United States, duly certified according to law in order that said court may inspect the same and take such action as it deems proper according to law.

It further appearing that in the Court below such proceedings were had as by consent the plaintiffs in order to have their property levied on released entered into a good and sufficient bond in the sum of Fifteen Hundred ($1,500.00) Dollars with the Fidelity

& Deposit Company of Baltimore, Maryland, as surety conditioned as required by law to abide by the final decree in this cause and faithfully pay the amount in controversy, as may be awarded in said decree, it is ordered that the said bond so given be regarded as the supercedeas bond in this cause and that no other or further supercedeas bond be required.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 28th day of January, 1920.

[Seal of United States District Court, Western Dist. of N. C.]

R. L. BLAYLOCK,
Clerk United States District Court for the Western District of North Carolina.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

28th day of January, 1920.

Filed in Supreme Court North Carolina, Jany. 28, 1920.
J. L. SEAWELL,
Clerk Supreme Court N. C.

39 [Endorsed:] Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc.., The Liberty Motors Corporation, and National Motors Company vs. Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina. Writ of Error. J. E. Alexander, Attorney and Counselor at Law, 8th Floor O'Hanlon Building, Winston-Salem, North Carolina.

40 *Citation.*

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company

vs.

GEO. W. FLYNT, Sheriff of Forsyth County, North Carolina, and D. A. STAFFORD, Sheriff of Guilford County, North Carolina.

To Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the City of Washington, District of Columbia, on the 28 day of February, 1920, pursuant to an order allowing a Writ of Error and entered in the Clerk's office of the Supreme Court of North Carolina from a final decree signed, filed and entered on the 28 day of January, 1920, in that

certain suit wherein Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation and National Motors Company, are plaintiffs, and you are defendants and appellee-, to show cause, if any there be, why the decree rendered against said appellants as in said order allowing the appeal mentioned, should any be given, and why justice should not be done to the parties in that behalf.

Witness the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 28 day of January, 1920.

WALTER CLARK.

A true Copy:
[Seal of the Supreme Court of the State of North Carolina.]
J. L. SEAWELL,
Clerk Supreme Court of
North Carolina.

41 Service of the within citation accepted and service by an officer expressly waived.
This 30 day Jan. 1920.

JONES & CLEMENT,
Attorneys for George W. Flynt,
Sheriff of Forsyth County, N. C.

Service of the within citation accepted and service by an officer expressly waived.
This 30 day Jan. 1920.

BROOKS, SAPP & KELLY,
Attorneys for D. A. Stafford,
Sheriff of Guilford County, N. C.

42 [Endorsed:] Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation and National Motors Company vs. Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina. Citation. J. E. Alexander, Attorney and Counselor at Law, 8th Floor O'Hanlon Building, Winston-Salem, North Carolina.

43 *Bond on Appeal.*

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company

VS.

GEO. W. FLYNT, Sheriff of Forsyth County, North Carolina, and D. A. STAFFORD, Sheriff of Guilford County, North Carolina.

Know all men by these presents: That we, Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving

Young & Company, Inc., The Liberty Motors Corporation and National Motors Company, as principles, and National Surety Company as surety, of the County of Forsyth and State of North Carolina, are held and firmly bound unto Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina, in the sum of Five Hundred ($500.00) Dollars lawful money of the United States to be paid to them and their respective successors, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally and each of us *are* successors, by these presents.

Signed with our seals and dated this 27th day of January, 1920.

Whereas, the above named Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation and National Motors Company have prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of North Carolina in the above entitled cause.

Now, therefore, the condition of the obligation is such that if the above named Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation and National Motors Company, shall prosecute their said appeal to effect and answer all cost if he fails to make good his plea, then this obligation shall be null and void, otherwise shall remain in full force and effect.

BETHLEHEM MOTORS CORPORATION.
NATIONAL MOTOR CAR AND VEHICLE CORPORATION.
W. IRVING YOUNG & COMPANY,
By I. H. YOUNG,
Secretary.
LIBERTY MOTORS CORPORATION,
By I. H. YOUNG,
Secretary.

LIBERTY MOTORS CORPORATION.

[L. S.]

NATIONAL MOTORS COMPANY,
44 NATIONAL SURETY COMPANY,
By J. E. ALEXANDER,
Attorney-in-Fact,
By JAMES S. DUNN,
Agent.

NATIONAL SURETY COMPANY.

[L. S.]

The foregoing bond is approved this 28th January 1920.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

44½ [Endorsed:] Bethlehem Motors Corporation, National Motor Car & Vehicle Corporation, W. Irving Young & Company, Inc., The Liberty Motors Corporation, and National Motors Company vs. Geo. W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina. Bond.

45 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct copy of the proceedings in this Court entitled, "Bethlehem Motors Corporation, W. Irving Young & Co., Inc., and The Liberty Motors Corporation vs. George W. Flynt, Sheriff of Forsyth County" as appear from originals on file in my office.

Witness my hand and seal of said Court at office in Raleigh this February 12, 1920.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 27,493. North Carolina Supreme Court. Term No. 254. Bethlehem Motors Corporation, National Motor Car and Vehicle Corporation, et al., plaintiffs in error, vs. George W. Flynt, Sheriff of Forsyth County, North Carolina, and D. A. Stafford, Sheriff of Guilford County, North Carolina. Filed February 21st, 1920. File No. 27,493.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 254.

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND VEHICLE CORPORATION, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. FLYNT, SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA, AND D. A. STAFFORD, SHERIFF OF GUILFORD COUNTY, NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

J. E. ALEXANDER,
[redacted],
Counsel for Plaintiffs in Error.

(27,492)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 254.

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND VEHICLE CORPORATION, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. FLYNT, SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA, AND D. A. STAFFORD, SHERIFF OF GUILFORD COUNTY, NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case involves the validity of one section of the North Carolina Revenue Act of 1917, as follows:

"SEC. 72. Manufacturer of Automobiles.—Every manufacturer of automobiles engaged in the business of selling the same in this State, or every person or persons or corporation engaged in selling automobiles in this State, the manufacturer of which has not paid the license tax provided for in this section, before selling or offering for sale any such machine, shall pay to the State Treasurer a tax of $500.00 and obtain a license for conducting such business. Any applicant for a license shall furnish the State Treasurer with the names of every class or style of the machine offered for sale, with a written application for the license. The State Treasurer shall, upon the written application of any one who has obtained a license provided in this section and the payment of a fee of $5.00, issue a certified duplicate containing the name of the agent representing the holder of the license, which gives him the privilege of doing business as the agent of the holder of the license. Every one to whom license shall have been issued as provided in this section shall have power to employ an unlimited number of agents to sell only the machine designated in the license, upon the payment of the tax aforesaid. Each county may levy a tax of $5.00 upon each agent doing business in the county. It shall be the duty of the State Treasurer to have this section printed on the face of each license issued under this act, for the information and protection of the parties to whom the same may be issued; provided, that where the manufacturer or person or persons or corporation licensed to do business in this State as provided by this act employs one or more traveling representatives, such traveling representatives may do business in any county in which the manufacturer or person or persons or corporation employing such traveling representatives has paid the tax of $5.00 to

the county as provided in this act, and such traveling representatives shall not be required to pay any tax to the county: Provided further, that if any officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz.: bonds of the State of North Carolina or of any county, city, or town of said State, or any property situated therein, and return for taxation therein, the taxes named in this section shall be one-fifth of those named. Provided further, that if, at the expiration of the State license issued under this section to any manufacturer or persons selling automobiles in the State, such license shall have been in force for less than six months, then upon a renewal of such license for the following year, the manufacturer or person shall be allowed by the State Treasurer a rebate of ($250.00) two hundred and fifty dollars on the new license."

The facts which are admitted and necessary to understand the bringing of this statute in question, briefly stated, are that the Bethlehem Motors Corporation is the manufacturer of Bethlehem Trucks at Allentown, Pa.; the National Motor Car and Vehicle Corporation is the manufacturer of National Cars at Indianapolis, Indiana. W. Irving Young & Company, a corporation of the State of Delaware, having its place of business at Winston-Salem, North Carolina, was State distributor for each of the above corporations for said trucks and cars in the States of North Carolina, South Carolina, and East Tennessee; the Liberty Motors Corporation, at Winston-Salem, Forsyth County, North Carolina, and the National

Motors Company, at Greensboro, Guilford County, North Carolina, were local dealers in said counties and State.

The manufacturers, Bethlehem Motors Corporation and National Motor Car and Vehicle Corporation, not having paid the taxes provided for in section 72 of the revenue act of said State, as set out above, and the State distributor and local dealers as above named not having paid same, as holding the view that the imposition of said tax was discriminatory and otherwise void, the defendants in error, sheriffs of Forsyth and Guilford counties, levied on a Bethlehem truck and a National car for sale to satisfy said taxes; the plaintiffs in error sued out an injunction which, on a hearing, was dissolved by the *nisi prius* judge; his judgment was affirmed by the Supreme Court of North Carolina, and from the judgment there (178 N. C., 399) this writ of error is pursued.

ARGUMENT.

Some of the assignments of error may, for argument, be discussed together.

Assignments IV and V.

IT IS URGED, AS SET OUT IN ASSIGNMENT IV AND ASSIGNMENT V, THAT SAID SECTION 72 OF THE REVENUE ACT OF 1917 OF NORTH CAROLINA WAS ILLEGAL AND VOID AS IN VIOLATION OF ARTICLE XIV, SECTION 1 (AMENDMENTS), OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, IN THAT SECTION 72 OF SAID REVENUE ACT DENIES TO THESE PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS.

It will be noted that section 72 of the revenue act in question first levies a privilege tax of $500.00 on all manufacturers of automobiles without reference to whether they are resident or foreign, or the owners of the securities of the State or its subsidiaries or of property in the State equal to at least three-fourths of the entire capital of such companies.

In default of such payment by such manufacturer, then the levy is on the dealer. The second proviso in said section 72, however, discloses the intent of the act. It is as follows:

> "*Provided further,* That if any officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz.: bonds of the State of North Carolina or of any county, city, or town of said State, or any property situated therein, and return for taxation therein, the taxes named in this section shall be one-fifth of those named."

The opinion below concedes (Record, top page 20) that "probably no manufacturer of automobiles in another State could invest three-fourths of all its assets in bonds of this State, or of any county, city, or town of this State."

The first point we wish to make about this proviso is that it is contrary to all common sense, as stated by the court below in its opinion, that any manufacturer of automobiles or any other product could or would invest at least three-fourths of the entire assets of the said manufacturer in bonds of the State of North Carolina, or of any county, city, or town of said State; but such manufacturer could invest three-fourths or all of his capital in property in said State, and so

it is that such plant or plants situated in North Carolina are under the act required to pay only $100.00 license tax, whereas the plaintiff manufacturers, or the State or local dealers as their representatives are required by the act to pay a license tax of $500.00, which it is plain denies to the plaintiffs the equal protection of the laws.

The common sense of the matter is that a manufacturer who does not have his plant in North Carolina must pay $500.00 license tax upon offering the product of his factory for sale in said State, whereas the North Carolina manufacturer would, under like circumstances, pay only $100.00. The legislature might just as well have said: Non-resident manufacturers of automobiles shall pay $500.00; resident manufacturers shall pay $100.00.

> "A State may not impose a license tax which *in effect* discriminates against the citizens or products of another State or country."
>
> 12 C. L., p. 104, sec. 142.
>
> Tiernan *vs.* Rinker, 102 U. S., 123; 26 L. Ed., 103.

A State may not fix a penalty for selling goods without a license, excepting goods manufactured in the State.

Ames *vs.* Peo., 25 Colo., 508; 55 P., 725.

The Supreme Court of North Carolina itself as far back as 1873 decided in the case of *Sinclair vs. State*, 69 N. C., 47, that,

> "The act of 1868-69, chap. 108, sec. 32, which declares 'that every non-resident who shall sell any spirituous liquors, by sample or otherwise, whether

> delivered or to be delivered, shall pay an annual tax of $50.00, and a tax of like amount as is payable by residents on their purchases or sales, as the case may be, of similar articles' is an act of the State imposing a discriminating tax upon non-resident traders trading in the State, and is repugnant to the Constitution of the United States and void."
>
> "A State may not except from the payment of the license fee resident manufacturers who have paid their taxes."
>
> Com. *vs.* Meyer, 92 Va., 809; 23 S. E., 915; 31 L. R. A., 379.

In this case last cited, decided by the Virginia Supreme Court of Appeals (1896), the court concludes the opinion in these words:

> "A citizen of Virginia who had manufactured the identical article could have hawked or peddled it from place to place within the limits of the commonwealth without incurring the penalties demanded by section 32. If that be so, then the statute under consideration does injuriously discriminate against the products of other States and the rights of other citizens, and is an attempt to fetter commerce among the States, and does deprive the citizens of another State of the privileges and immunities possessed by citizens of this State, and is an infringement of the provisions of the Constitution, and, therefore, void."

This is quite the situation with the case at bar. Had these trucks been made by the Corbett Company at Henderson, North Carolina, or cars made by the American Company at Greensboro, North Carolina, or the Wizzard Company at Charlotte, North Carolina, they could have been sold for a

license fee of $100.00; whereas, the State imposes a tax of $500.00 on these plaintiffs. This is the discrimination complained of.

Assignment VI.

FOR THAT IT WAS NOT IN THE POWER OF THE STATE OF NORTH CAROLINA TO ENACT SAID SECTION 72, CHAPTER 23, PUBLIC LAWS 1917.

The argument heretofore set out is applicable here. The legislation having been forbidden by the Federal Constitution, the power of the States, if it ever existed, to pass this legislation ceased when the States adopted the Federal Constitution and the several amendments and ceded certain of their powers to the Federal Government or agreed not to exercise such powers.

> "In general it is without the power of a State or municipality to * * * discriminate in its license tax legislation concerning sales by agents against the citizens or the products of other States or foreign countries."
>
> 12 C. J., p. 105, sec. 145.

The cases on this point, beginning with *Weber vs. Virginia,* 103 U. S., 344, both from this and many State courts, are compiled in notes 88 and 89 in 12 C. J., p. 105 above.

As the proposition is now elemental, it is not deemed necessary to set out a compilation of authorities herein.

By reference to the statute of Virginia, set out in the margin in the case of *Armour vs. Virginia,* 246 U. S., 1, relied on in the opinion below as authority for the decision

in the case at bar, it will be seen that the common sense of that statute was to impose a tax on merchants and it provided simply that where a manufacturer sells the product of his factory at the place of manufacture, he is not to be regarded as a merchant within the meaning of that revenue act, the court holding it was within the power of the State to pass such a statute. That case, as is seen, creates quite a different situation from the case at bar, which makes no attempt to except manufacturers who sell automobiles at the place of manufacture, but excepts them solely on the ground of their investments of their capital in the property of the State or its political divisions or in its own property in the State.

Assignment II.

IN HOLDING THAT SAID SECTION 72, CHAPTER 23, REVENUE ACT OF NORTH CAROLINA, WAS NOT ILLEGAL AND VOID AND IN CONTRAVENTION OF ARTICLE I, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS ATTEMPTING TO REGULATE COMMERCE BETWEEN THE STATES.

The court below found the fact that the plaintiffs sold from a warehouse, that the goods were within the State. While this is in part correct and admitted to be correct, nevertheless it does not tell the whole story; neither does it follow that on that account, after the goods got to Winston-Salem, they were sold, that they were deprived of their interstate character.

Automobile manufacturers and dealers are ingenious people in their sales and as the record discloses, in order to

market the products of their factories, they used what is known as a *Distributor,* in this case W. I. Young & Company, which was to distribute the products of the plaintiffs' factories for North Carolina, South Carolina and East Tennessee. This Distributor then had under it local dealers which sold to the retail trade. Now this arrangement was, as appears in the record, a part of a general plan to market the product of the plaintiff factories. We think that because some of the cars were sold from stock, does not alter the general character of the interstate business. The tax must be on the general business.

> "Substance and not form controls in determining whether a particular transaction is one of interstate commerce."
>
> 12 C. J., p. 21, Sec. 19.
>
> Heyman *vs.* Hays, 236 U. S., 178.

> "Transactions of interstate commerce comprehend every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any State or Territory or the District of Columbia with those of another political division of the United States, which contemplates and causes an importation into the State, either of goods, of persons or of information."
>
> 12 C. J., p. 21, Sec. 19, and cases cited in Note 28.

Assignment VII.

Assignment No. VII is formal, to the judgment.

Assignment VIII.

Besides the brief for the parties, the Honorable Attorney General for the State filed a brief in the State Supreme Court in which, for the first time, it was suggested that the plaintiffs were not in the jurisdiction within the meaning of the 14th amendment. This was nowhere suggested at *nisi prius*, and not set up in the answer. In fact, the answers admit the parties were in the jurisdiction.

The levy of the sheriff, Exhibit "A" of the complaint (Record, p. 5), purports to levy on the property of "The Bethlehem Truck Company, operated by W. I. Young & Company, agent, 517 North Liberty street, Winston-Salem, N. C., * * * by seizing a Bethlehem Truck No. 2792, Model E, the property of The Bethlehem Truck Company."

The defendant admits the Bethlehem Company has property in the State and is represented by W. I. Young & Company, agent. In paragraph 5 of the answer (Record, p. 8) the defendant says: that he found W. Irving Young, who he elsewhere admits is president of W. I. Young & Company, and Liberty Motors Corporation at their place of business, 517 N. Liberty street, city of Winston-Salem, N. C., and there *served on him the levy and notice of sale.* And in his further answer Sheriff Flynt says:

> " * * * This defendant is further informed, believes and alleges that the plaintiffs have now in their warehouse on Liberty street numbers of Bethlehem motor trucks and other automobiles and are making sales of the same as rapidly as they can without procuring license, as required under the Revenue Act of 1917, and in violation of the law."

The court found as a fact (Record, p. 12) that at the times the sheriffs made their seizures the car and truck were *"in the place of business"* of W. Irving Young & Company and Liberty Motors Corporation and National Motors Corporation.

This case was in the State Court of North Carolina, which is presumed by the rules and decisions of the Courts of that State to have jurisdiction until the contrary is shown in the proper way.

Should the defendant wish to avail itself of that plea that the plaintiffs were not in the jurisdiction, they should have done so by answer or motion based on affidavits.

Assignment IX.

The Attorney General in his brief below said:

> "If, however, the court should be of the opinion that this proviso of Section 72 is discriminatory in the regard stated above, and so is unconstitutional and void, it seems plain to us it may be stricken out without at all impairing the validity of the rest of the section."

Just how this can be done we do not quite understand. The legislature never intended to tax the North Carolina factory but $100; if the proviso goes out and the balance of the section stands, the North Carolina factory and every other will pay $500, which the legislature did not intend.

> "The rule is that if the invalid portions can be separated from the rest and if after their excision there remains a complete, intelligible and valid statute

capable of being executed, and *conforming to the general purpose and intent of the legislature,* as shown in the act, it will not be adjudged unconstitutional, but sustained to that extent."

Presser *vs.* Illinois, 116 U. S., 252.

The real intent and purpose of the legislature, as is shown by section 72, was to discriminate between North Carolina and the factories of other States, thus to encourage investment within the State, the "home industry" idea. To strike out the proviso and allow the remainder of the section to stand would thwart and not sustain the general intent of the legislature.

For the reasons stated we ask that the decree below be reversed.

J. E. ALEXANDER,
Winston-Salem, N. C.;
[redacted]

Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 254.

BETHLEHEM MOTORS CORPORATION, NATIONAL MOTOR CAR AND VEHICLE CORPORATION, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. FLYNT, SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA, AND D. A. STAFFORD, SHERIFF OF GUILFORD COUNTY, NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

J. E. ALEXANDER,
Counsel for Plaintiffs in Error.

(27,492)

SUPREME COURT OF THE UNITED STATES.

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REPLY BRIEF FOR PLAINTIFFS IN ERROR.

It is contended by the Honorable Attorney-General in his brief, page 8:

> "This proviso, however, goes further and reduces the rate of the license tax from $500 to $100 to the manufacturer who has three-fourths of his assets in-

> vested in property situated in the State and returned for taxation therein. It is clear that this also is as open to non-resident manufacturers as to resident."

The Honorable Attorney-General thus mistakes the discrimination complained of. This discrimination is as the case at bar, where the manufacturers of other States who have their factories in other States and citizens of other States undertake to do interstate business in North Carolina. They are taxed $500.00, whereas the North Carolina corporation is taxed only $100.00. The amount is inconsequential, but if once established the principle is most important, for it follows that if this principle were established the Legislature could levy a license tax of a much larger amount, say, $12,000 or $1,000 a month or even more, at the same time fixing a nominal tax of $100 on corporations having their plants within the State or exempting them altogether.

The common sense of all this is that it prevents interchange of merchandise between the inhabitants of the States. It forces the foreign corporation to establish its plant in North Carolina if it would be on equal tax basis with the home company.

I take it that what the Attorney-General is saying is: Companies organized by North Carolina or other citizens under the laws of Delaware or New Jersey, for example, if three-fourths of their assets are invested in North Carolina, will be on tax equality with the North Carolina company. Technically, corporations are citizens of the State under whose laws they are created, and although such a company may be by this standard a citizen of Delaware or New Jersey, it may have tax equality upon investing three-fourths of its property in North Carolina; and thus, he says, the law is equal.

But this does not really answer. The State has no right, neither is it within its power, to enact legislation which forces a foreign company to bring its factory to North Carolina in order to have equal taxation; these factories run into millions of dollars; they are established in other States and citizens thereof. Is it not plain that, stripped of all over-refined reasoning, this tax is really and truly a substantial burden on the plaintiff in error and all similarly situated different in degree from that imposed on the home companies? If so, this section of the statute is void.

It does by indirection what cannot be done directly; it is certainly an indirect and covert plan to interfere with the free and untrammeled right of commerce between the States; is a direct burden thereon; to the extent of the tax imposed, it keeps out of North Carolina the products of factories located in other States and denies to the inhabitants of North Carolina the competitive prices which would be to their benefit if the products of other States were admitted into North Carolina on an equal tax basis with those made inside the State.

The statement made by the Honorable Attorney-General is not all; it is a part, but not the whole case; there is a burden placed on the like factories and like products of other States and located in such States different in degree and amount from that imposed on factories located in North Carolina; those factories, owned by citizens of other States and represented by W. Irving Young & Company, a Delaware corporation, which at all times maintained offices in Winston-Salem, North Carolina, with its president in charge, on the face of the act and particularly called to the attention of the court in this case, gives one burden to such non-resident factory and

its products and another burden to the resident factory. thus denying to the plaintiffs the equal protection of the laws.

It is not enough to say to the plaintiffs and others, "You have a right to put your factory in North Carolina and be tax exempt." That is not what the framers of the Constitution meant: they intended that one could have his factory in any State and when he went to trade in any other State he should have no burdens placed on him which were not placed on citizens of the State he went to; and no burdens on commerce as such at all.

To state the *reductio ad absurdum:* Should these rather ingenious schemes of nullifying the Federal Constitution be approved, what could it lead to? North Carolina could pass an act levying a license tax of, say, $12,000 on automobile manufacturers, but excepting resident manufacturers who paid tax on property; Indiana in retaliation could assess, say, manufacturers of tobacco $12,000 and except its own factories, and Pennsylvania could assess furniture manufacturers $12,000 and except resident factories which had three-fourths of its property in that State.

Thus the plaintiff automobile factories might be forced out of business in North Carolina and the North Carolina tobacco factories forced out of business in Indiana and the North Carolina furniture factories forced out of business in Pennsylvania, and so every State would return to the primitive position it was in prior to the adoption of the Constitution of 1789.

All these more or less ingenious attempts to nullify by indirection the basic principles of our beneficial plan of government are regrettable and unfortunate. The thought I have about it is that no entering wedge for such legislation

should be permitted by a precedent of this court, but the people left to that freedom of trade, commerce, and intercourse which was the original plan of our Government and which, with modern means of communication, by numerous railroad transportation, is more important to our people now than ever before.

Stripped of all technical defenses and viewed in the light of common sense and without seeking to reflect in any way on the drafter of this ingenious statute, it must be plain and apparent that this statute does deny to the plaintiffs the equal protection of the laws and does place a burden upon the free interchange of commodities between the States.

Such legislation has from the beginning been forbidden by our Federal Constitution and is most injurious and harmful to our people.

The excerpts from cases cited by the Honorable Attorney-General were from cases on an entirely different state of facts from the case at bar.

In our main brief it was shown that *Armour vs. Virginia*, 200 U. S., 226, arose out of a statute of Virginia defining "merchants" and saying a manufacturer who sold at his factory was not a merchant within the meaning of that statute; that was all. It was plain he was no such merchant as the statute contemplated, which was a merchant as is usually observed in city stores or country stores.

New York vs. Roberts, 171 U. S., 658, decided by a divided court, merely decided the validity of a tax on business conducted within the State of New York, where Parke, Davis & Company, a Michigan corporation, employed forty to fifty persons, owned property in the shape of business fixtures worth $15,000 situate in New York city, and expended there

annually from $102,000 to $172,000. It held Parke, Davis & Company liable for the tax. That statute was especially intended as one licensing foreign corporations to do business in the State; but in the case at bar no such provision exists; it merely makes a flat rate distinction between factories in and out of the State; those that are in pay $100.00; those that are out pay $500.00.

An examination of the case of *Reyman Brewing Co. vs. Brister,* 179 U. S., 445, also reveals that that case is not in point. The statute in question known as the "Dow laws" of Ohio provided:

> "That upon the business of trafficking in spirituous, vinous, malt, or intoxicating liquors there shall be assessed yearly and shall be paid into the county treasury, as hereinafter provided, by every person, corporation, or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or copartnership, the sum of $350.00."
>
> 92 Ohio Laws, p. 34.

That is all. It is plain the statute did not discriminate and made no exception. There was no proviso, as in the case at bar, reducing the tax on resident dealers to $100. The statute was upheld, also, on the ground that it was a police regulation.

It is, therefore, clear that the cases relied on are not in point; are on wholly different states of facts and statutes.

Broadly speaking, on the contrary, the North Carolina statute on its face makes a distinction between the North Carolina manufacturer and the non-resident manufacturer, and not only so, but, as in this case, in the work and operation under the statute.

The State of North Carolina has laws relating to the domestication of foreign corporations wholly different from that in the case at bar. See Consolidated Statutes of North Carolina 1919, section 1181. The question here has no relation to the domestication of the plaintiff corporations.

I fear I make my brief too long. As one who reveres the Constitution, I urgently ask the court to reverse the judgment below and let it be known by the decision herein, recurring to fundamentals and the original plan of government, that it is not possible for one State to discriminate against another. The States do not really want anything like that anyway. I take it this statute was an inadvertence.

All of which is respectfully submitted.

J. E. ALEXANDER,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE DEFENDANTS IN ERROR

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SUPREME COURT OF THE UNITED STATES

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against

GEORGE W. FLYNT, Sheriff of Forsyth County, North Carolina, and D. A. STAFFORD, Sheriff of Guilford County, North Carolina

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BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF CASE

The plaintiffs in error were engaged in the business of selling automobiles and trucks in the State of North Carolina without first having paid the license tax imposed upon such occupation in section 72 of chapter 231 of the Public Laws of 1917 (The Revenue Act of the State of North Carolina), and the defendants in error are the sheriffs of two adjoining counties of that State who, in obedience to the commands of section 89 of said Revenue Act of 1919, levied upon, the sheriff of Forsyth County, a National car belonging to the National Motor and Vehicle Company, and the sheriff of Guilford, upon a Bethlehem truck, the property of the Bethlehem Motors Corporation. The statutes under which the defendants in error acted are as follows:

Section 72, chapter 231, of the Public Laws of 1917:

> "Every manufacturer of automobiles engaged in the business of selling the same in this State, or every person or persons or corporation engaged in selling automobiles in this State, the manufacturer of which has not paid the license tax provided for in this section, before selling or offering for sale any such machine, shall pay to the State Treasurer a tax of five hundred dollars and obtain a license for conducting such business. Any applicant for a license shall furnish the State Treasurer with the names of every class or style of machine offered for sale, with a written application for the license. The State Treasurer shall,

upon the written application of any one who has obtained the license provided in this section and the payment of a fee of five dollars, issue a certified duplicate containing the names of the agent representing the holder of the license, which gives him the privilege of doing business as the agent of the holder of the license. Every one to whom license shall have been issued as provided in this section shall have power to employ an unlimited number of agents to sell only the machine designated in the license, upon the payment of the tax aforesaid. Each county may levy a tax of five dollars upon each agent doing business in the county. It shall be the duty of the State Treasurer to have this section printed on the face of each license issued under this act, for the information and protection of parties to whom the same may be issued: *Provided*, that where a manufacturer or person or persons or corporation licensed to do business in this State as provided by this act employs one or more traveling representatives, such traveling representatives may do business in any county in which the manufacturer or person or persons or corporation employing such traveling representatives has paid the tax of five dollars to the county as provided by this act, and such traveling representatives shall not be required to pay any tax to the county; *Provided further*, that if any officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz.: bonds of the State of North Carolina or of any county, city, or town of said State, or any property situated therein, and returned for taxation therein, the taxes named in this section shall be one-fifth of those named: *Provided further*, that if, at the expiration of a State license issued under this section to any manufacturer or person selling automobiles in the State, such license shall have been in force for less than six months, then upon a renewal of such license for the following year the manufacturer or person shall be allowed by the State Treasurer a rebate of two hundred and fifty dollars ($250) on the new license."

Section 89, chapter 231, Public Laws of 1917:

"Except where otherwise provided in this act, the sheriffs and tax collectors of the several counties of the State shall be the agents of the State for the issuing of license and collection of license taxes provided for in this act; and it shall be their duty from time to time to make diligent inquiry if all parties within their respective counties who are liable for any such specific tax

have paid the same; and if after sixty days from the first day of May any person, firm, or corporation is found to be carrying on any business or practicing any profession for which a license is required by this act, without such license, it shall be the duty of such sheriff to demand the immediate payment of the tax, with an additional penalty of twenty per centum (the said penalty not to exceed ten dollars in any one case) as a penalty for failure to procure said license before engaging in such business or practicing such profession as required by this act; and in default of such immediate payment the sheriff shall have power, and it shall be his duty, to levy upon any personal or real estate owned by such person, firm, or corporation, and sell the same for the payment of said tax, penalty, and costs, in the same manner as provided by law for levy and sale of property for collection of other taxes; and if sufficient property is not found it shall be his duty to swear out a warrant before some justice of the peace of his county for the violation of this act, as provided in section eighty-five: *Provided,* that the sheriff shall not be liable for false arrest or wrongfully levying upon any property under this section unless it shall appear that the sheriff did so maliciously: *Provided further,* that no sheriff shall issue any license under Schedule B after the expiration of sixty days from the first day of May without collecting the penalty herein provided, unless it be shown that the person, firm or corporation to whom such license is issued did not engage in the business or practice the profession for which license is required after the first day of May and prior to the issuance of said license."

The plaintiffs in error, after levies had been made upon an automobile and truck by the defendants in error, as above stated, obtained a temporary restraining order from Hon. Henry P. Lane, resident judge of the 11th Judicial District, returnable before Hon. T. E. Bryson, judge holding courts in said district. Judge Bryson heard the motion to make said restraining order permanent at the May Term, 1919, of the Forsyth County Superior Court, and after finding the facts as herein stated, dissolved the restraining order, and directed the sheriff to proceed with the collection of the taxes. From this judgment of Judge Bryson the plaintiffs in error appealed to the Supreme Court of North Carolina, where such appeal was heard at the Fall Term, 1919, of said court and the judgment of Judge Bryson was affirmed. The opinion of the Court on such appeal is found on pp. 18 to 20 of the Record in this Court, and in 178 N. C., p. 399.

The findings of fact upon which both of such judgments were based are found on pp. 11 to 13 of the Record, and so far as material to this discussion, are as follows:

"1. That the Bethlehem Motors Corporation is a corporation and is engaged in manufacturing automobile trucks at Allentown, Pa.; that the National Motor and Vehicle Company is a corporation and manufacturers of automobiles at Indianapolis, Ind. That each and both of said corporations distribute the products of their factories in the states of North Carolina, South Carolina and East Tennessee through W. Irving Young & Co., a corporation of the State of Delaware, whose said business in the State of North Carolina is conducted by the Liberty Motors Corporation and the National Motors Company, each and both corporations of the State of North Carolina."

"2. The method of distributing the said trucks and cars is as follows:

"The trucks are manufactured at Allentown, Pa., and the cars at Indianapolis, Ind., and from the factories in said states shipped by freight into the State of North Carolina.

"That the said trucks and cars are shipped by the manufacturers to the Liberty Motors Corporation, doing business in the city of Winston-Salem, N. C., and to the National Motors Corporation, doing business in the city of Greensboro, State of North Carolina, both of which corporations thereupon were and became the agents of Bethlehem Motors Corporation, W. Irving Young & Co., and National Motor Vehicle Company for the purpose of selling and delivering said trucks and automobiles.

"That the said trucks and automobiles so consigned to the Liberty Motors Corporation and National Motor Company are sold direct by the Liberty Motors Corporation and the National Motor Company from their storage warehouses, and are consigned to them for that purpose and not to be used exclusively as samples or for demonstration purposes, but the court finds from the testimony that purchasers solicited by the Liberty Motors Corporation and National Motor Company, the cars and trucks on hand used for demonstration and sales made thereof direct from the warehouse or storage building of the said Liberty Motors Corporation and National Motor Company within the State of North Carolina, and that the said motors and automobiles so consigned to them are not used or intended to be used simply for the purpose of soliciting orders to be filled by shipment from the plant of Bethlehem Motors Corporation and National Motor and Vehicle Company.

"3. That pursuant to the provisions of sections 72 and 87 of the Revenue Act of 1917, of North Carolina, the said manufacturers not having paid the tax provided for therein, the sheriff of Forsyth County levied on one National car, product of the National Motor and Vehicle Company, of Indianapolis, Ind., and the sheriff of Guilford County levied on one Bethlehem truck, product of the Bethlehem Motors Corporation, of Allentown, Pa., and threatened to sell same for said taxes.

"4. At the time of said levy the said National car was in the place of business of W. Irving Young & Co., and the Liberty Motors Company in the city of Winston-Salem, North Carolina, and the Bethlehem truck levied on by the sheriff of Guilford County was in the place of business of the National Motors Corporation at Greensboro, North Carolina.

"5. While it may appear in the pleadings and other papers in the case that the two sheriffs each levied on a Bethlehem truck, in order to facilitate the case and avoid unnecessary expense therein, it is agreed that the levy made by the sheriff of Forsyth County shall relate to a National car in substitution for the Bethlehem truck, and the levy in Guilford County to a Bethlehem truck, as fully and as to the same extent as if actually seized.

"And by consent it is ordered that the National Motor and Vehicle Company be set down as a party plaintiff, and that all the parties plaintiff adopt the complaint filed in this cause.

"6. Counsel for plaintiffs and defendants have agreed on findings of facts in Nos. 1, 3, 4 and 5 herein; they have not agreed on the findings in No. 2 herein, which is made by the Court.

"On the foregoing findings the Court is of the opinion and so holds that the plaintiffs, Bethlehem Motors Corporation and National Motor and Vehicle Company, are manufacturers of automobiles and trucks, engaged through their agent, W. Irving Young & Co., and the Liberty Motors Corporation and National Motors Corporation is in business of selling the same in the State of North Carolina.

"That as said manufacturers of automobiles and trucks they are subject to a license tax provided by section 72, chapter 231, Public Acts of 1917.

"That said tax has not been paid as provided by law. That the General Assembly, by the use of words "manufacturers of automobiles" intended to include thereby motor-propelled trucks, and that the trucks mentioned in the pleadings fall within the meaning of section 72, chapter 231, Acts of 1917."

The key-note, it seems to us, of the above quoted section 72, is, so far as this discussion is concerned, in the words "engaged in the business of selling." It is not the manufacturing of automobiles and trucks that is taxed, but it is the business of selling them. It applies only to sales in this State, but it applies no less clearly to nonresident salesmen than to resident salesmen, where those nonresident salesmen, whether manufacturers or not, maintain in North Carolina, either by themselves or by their selected agents, storage warehouses from which machines are sold and delivered. That in the instant case such were the facts appears plainly from finding 2 of the judge's findings of fact above quoted.

ARGUMENT

The learned counsel for the plaintiffs in error has seven assignments of error incorporated in the Record. We shall treat them under only two heads, believing that thus we can deal better with the real questions involved in this appeal.

1. Is there anything in the statute itself, or the necessary effect of its operation which offends against the interstate commerce provision of the Federal Constitution, Art. I, sec. 8, clause 3, of said Constitution?

2. Does the second proviso in section 72, quoted above, confer such special privileges upon a local manufacturer of automobiles as to make that proviso so discriminate against interstate commerce as to constitute it a burden upon it? That proviso is as follows:

> "*Provided further,* that if any officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested in any of the following securities or property, viz.: bonds of the State of North Carolina or of any county, city or town of said State, or any property situated therein, and returned for taxation therein, the taxes named in this section shall be one-fifth those named."

1. We submit that there is nothing in the statute itself or in its operation which imposes any burden on interstate commerce at all. It, by its terms, applies no less to resident manufacturers than it does to nonresident; it applies no less to resident salesmen than it does to nonresident. The findings of fact made by the judge and quoted above, particularly the second finding, are conclusive upon this Court.

Gulf C. and S. F. R. Co. v. Texas, 204 U. S., 403, at 411, and the cases there cited. Section 72 does not meet the plaintiffs in error at the border of the State and there levy a tax upon them for the privilege of bringing their cars into the State. It does exact from them as a privilege or license tax, a tax after they come into the State and engage in the business of selling automobiles in the State, particularly when these automobiles have become mingled in the general mass of property, are stored in warehouses, and from those warehouses sold and delivered to customers. In *Cheney Bros. Co. v. Massachusetts,* 246 U. S. 147, this Court decided quite a number of cases in which an attack was made upon the constitutionality of a Massachusetts excise law. That decision is directly in point to this case, as the following extracts from its head-notes show:

"1. The corporate excise tax imposed by St. Mass. 1909 violated the commerce clause of the Federal Constitution by taxing interstate business, when applied to a foreign corporation maintaining only a local selling office, in which sample goods were kept and from which its salesmen solicited orders subject to the home office's approval.

"2. The statute did not impose a tax on interstate commerce as applied to a foreign corporation keeping a stock of typesetting machine parts within the State and selling such parts locally.

"3. A tax was not imposed on interstate commerce as applied to a foreign automobile corporation repairing and selling second-hand cars within the State, although such local business tended to maintain the volume of its interstate business in new cars.

"4. A tax was not imposed on interstate commerce as applied to a foreign flour-milling corporation employing salesmen to induce local retailers to purchase the corporation's flour from local wholesale dealers.

"5. A foreign holding corporation, whose local activities were confined to holding stockholders' and directors' meetings, keeping records, distributing dividends, etc., was not engaged in interstate commerce.

"6. A foreign corporation, maintaining a local office from which it distributed dividends and where it held directors' meetings, at which officers were elected, the execution of deeds to lands outside of the State were authorized, etc., was not thereby engaged in interstate commerce."

Head-note 1 copied above, as compared with head-notes 2 to 6 inclusive, very clearly marks the distinction between selling which is an act of interstate commerce, and selling which is not, and this as clearly puts the selling in the instant case in the latter class. Here, the orders for automobiles, or trucks, were not taken in North Carolina to be filled in another State, these orders, being transmitted to the latter State for acceptance or rejection, and filled from stock in that State. To tax that business would clearly be a tax upon interstate commerce. *Crenshaw v. Arkansas,* 227 U. S., 389. The tax here is similar to that sustained in the *Armour Packing Company v. Lacy,* 200 U. S., 226, and in *Singer Sewing Machine Company v. Brickell,* 233 U. S., 304.

2. Does the proviso quoted above constitute such illegal discrimination as to make it a burden upon interstate commerce?

We agree with the learned counsel for the plaintiffs in error that that part of the proviso which reduces the license tax from $500 to $100 per annum to any manufacturer of automobiles who invests at least three-fourths of his entire assets in bonds of the State of North Carolina of any county, city or town of the said State, is an utterly futile project. No manufacturer of automobiles could manufacture automobiles at all if three-fourths of his assets were invested in bonds of any kind. Such a provision, in practical effect, can mean nothing because it can have no subject on which to operate. From nothing, nothing can arise. Discrimination, then, cannot be predicated upon any scheme which is not workable. As a matter of fact, however, if, by any possibility, it could be worked, it is as open to nonresidents as to residents. This proviso, however, goes further and reduces the rate of the license tax from $500 to $100 to the manufacturer who has three-fourths of his assets invested in property situated in the State and returned for taxation therein. It is clear that this also is as open to nonresident manufacturers as to resident. It is, in no sense, such a discrimination as that condemned in *Darnell & Son v. Memphis,* 208 U. S., 113.

In *New York v. Roberts,* 171 U. S., 658, the Court, through Mr. Justice Shiras, says:

> "It must be regarded as finally settled by frequent decisions of this Court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its

limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital use within the State."

And then, in reply to the contentions that the New York statute in that case discriminated against a foreign corporation, he says:

"If the object of the law in question was to impose a tax upon products of other states while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the states. But we think that, obviously, such is not the purpose of this legislation. Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the State treasury annually, to be computed as follows . . . :

"It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but include corporations of other states as well, when wholly engaged in manufacturing within the State."

The following are two of the head-notes of *Reymann Brewing Co. v. Brister,* 179 U. S., 445:

"1. The exemption of sales of intoxicating liquors by the manufacturer at the manufactory in quantities of one gallon or more, which is made by 92 Ohio Laws, p. 34, known as the Dow law, being applicable to such sales made at any manufactory in the State, without regard to the residence, citizenship, or domicil of the person, copartnership, or corporation which owns the plant, does not constitute an illegal discrimination against a foreign corporation which has its manufactory in another State.

"2. A foreign corporation is a trafficker in intoxicating liquors subject to tax under 92 Ohio Laws, p. 34, when it maintains a storehouse in the State where it sells and delivers beer and collects payment."

A Virginia statute was as follows:

> "Every person, firm, company, or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State, to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State, as merchandise, shall be considered as purchases within the meaning of this section: *Provided,* that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale, at the place of manufacture, goods, wares and merchandise manufactured by them."

The Supreme Court sustained this statute in its application to Armour & Co., New Jersey corporation, engaged in the packing business. It had various establishments in several states and carried on in Virginia the merchandise business of selling packing-house products at the respective agencies which it had established. For the purpose of the merchant's license in question, the company was called upon to return the sum of its purchases, including the amount shipped into the State for sale at its agencies, whether or not manufactured by itself. The corporation declined to comply and commenced this suit to enjoin the enforcement of the statute in so far as it required the inclusion in the amount of purchases of merchandise manufactured by the corporation in other states and shipped into Virginia for sale. *Armour & Co. v. Virginia,* 246 U. S., 1.

The head-notes of that decision as digested by the West Publishing Company, 38 S. C. Rep. 267, are as follows:

> "1. Tax law of Virginia imposing a license tax upon merchants for the privilege of doing business in the State, to be graduated by the amount of purchases, and declaring that all goods, wares, and merchandise manufactured by such merchants and sold or offered for sale shall be considered as purchases, but that the section shall not be construed as applying to manufacturers taxed on capital by the state who offer for sale at the place of manufacture goods, wares, and merchandise manufactured by them, is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; the distinction between the two classes upon which the classification rests being obvious."

"2. Such act, as applicable to nonresident manufacturers who ship their products into the state of Virginia, is not invalid as a direct burden upon interstate commerce; the exclusion of manufacturers selling at their place of manufacture being open to all, whether noncitizens or nonresidents, who manufacture in Virginia, and Virginia manufacturers being absolutely liable for the tax in case they sell as merchants the goods manufactured at a place other than the place of manufacture.

"3. As such statute was within the legislative authority of the state, and was not invalid as imposing a direct burden on interstate commerce, or violating the equal protection clause of the Fourteenth Amendment of the United States Constitution, it is not subject to attack as violating the privileges and immunities clause of article 4, or the clause of the Fourteenth Amendment, declaring that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States."

There is the same so-called discrimination between a resident agent of a nonresident manufacturer of automobiles and the local manufacturer who sells his own machines, if the local manufacturer has three-fourths of his assets invested in property, situated in the state and return for taxation therein, yet no attack has been made upon the act in this regard in the state courts, and, if it should be made, it is apparent, we think, from *Smith v. Wilkins,* 164 N. C., 136, that the Supreme Court would sustain the act as a valid classification under our constitution.

We respectfully submit further that the plaintiffs in error, the Bethlehem Motors Corporation and the National Motor Car and Vehicle Corporation, were not within the jurisdiction of the State within the meaning of the Fourteenth Amendment to the Federal Constitution in such way as to enable them to invoke the equal protection clause of that instrument. *Blake v. McClung,* 172 U. S., 239, particularly at p. 260 *et seq.* Neither of these corporations was doing business in North Carolina under conditions that subjected it to process issuing from the courts of that State at the instance of suitors within the State. It is true that both of them had property in the state consigned for sale to local factors or commission merchants or agents, but we do not understand that because there is property in the state, of a nonresident corporation, which

property may be levied upon either by way of attachment issuing out of the State courts in behalf of a private creditor, or for taxes due the State, that the corporation is thus within the jurisdiction of the State within the meaning of the terms used in the Fourteenth Amendment. It was held in *Butler Shoe Company v. United States Rubber* Company, 156 Fed. Rep. p. 1, that if the resident agent is a factor, or commission merchant, and a foreign corporation consigns its goods to this commission merchant to be sold by him upon a commission, the foreign corporation would not be doing business within the State in such way as to require it to be domesticated within the terms of the statute of that State. Petition for *certiorari* in this case was afterwards filed in the United States Supreme Court and denied. 212 United States, p. 577. To the same effect is *In re Monongahela Distillery Company,* 186 Fed. Rep. 220.

The Attorney-General has ruled, and his ruling has been acted upon by the State authorities, that automobile manufacturers, who pay the license tax prescribed by section 72 of the Revenue Act above referred to, are permitted to do business in the State and are not required to domesticate.

Respectfully submitted,

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JAMES S. MANNING,
Attorney-General.

EDWARDS & BROUGHTON PRINTING CO., RALEIGH, N. C.

Counsel for Parties.

BETHLEHEM MOTORS CORPORATION ET AL. *v.* FLYNT, SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 254. Submitted March 22, 1921.—Decided June 1, 1921.

A North Carolina statute (Laws 1917, c. 231) provided that every manufacturer of automobiles engaged in the business of selling them in the State must pay a license tax of $500 before selling or offering for sale, and made like requirement of every person or corporation there engaged in selling automobiles of a manufacturer who had not paid such tax, but further provided that, if an officer or representative of such manufacturer should file a sworn statement showing that at least three-fourths of the entire assets of the manufacturer were invested in bonds of the State or its municipalities or in property therein situate and returned for taxation, the license tax should be reduced to $100. As applied to two corporations of other States which made automobiles outside of North Carolina and a third which distributed them there through local agencies to which the automobiles were consigned for sale,—

Held: (1) That, assuming the corporations were doing business in North Carolina and were subject to her jurisdiction, the statute worked a discrimination against them, contrary to the Fourteenth Amendment. P. 424.

(2) That, without such assumption, it discriminated against their products, in violation of the commerce clause. P. 426.

178 N. Car. 399, reversed.

ERROR to a judgment of the Supreme Court of North Carolina sustaining a state license tax in a suit to restrain its enforcement. The facts are stated in the opinion.

Mr. J. E. Alexander for plaintiffs in error.

Mr. James S. Manning, Attorney General of the State of North Carolina, for defendants in error. *Mr. Frank Nash* was also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The defendants in error are, respectively, Sheriffs of Forsyth and Guilford Counties, North Carolina. Under the laws of the State, for the non-payment of a license tax, the former levied on a motor truck belonging to the Bethlehem Corporation (referred to as the Pennsylvania Corporation); the latter levied on a car belonging to the National Motor Car and Vehicle Corporation (referred to as the Indiana Corporation). The trucks are manufactured in Pennsylvania, the cars in Indiana; and they are distributed in North Carolina and other States through W. Irving Young & Company, (referred to as the Delaware Corporation) a corporation of the State of Delaware, which conducts its business in North Carolina by the Liberty Motors Corporation and the National Motors Company, these companies being corporations of North Carolina. And it is the finding or conclusion of the trial court that "both corporations thereupon were and became the agents" of the three other corporations "for the purpose of selling and delivering said trucks and automobiles." They were consigned to the two latter companies and were sold direct by them from their storage warehouse, being consigned to them for that purpose and not to be used exclusively as samples or for demonstration purposes, nor used or intended to be used simply for the purpose of soliciting orders to be filled by shipment from the place of their manufacture.

Plaintiffs in error brought this suit in the Superior Court of Forsyth County to restrain the defendants in error from selling the truck and car. A preliminary restraining order was granted. It was subsequently dissolved. The order of dissolution was affirmed by the Supreme Court, thereby sustaining the license tax and the levy upon the automobiles made to enforce it.

A summary of the act by which a license is required is necessary. It provides in § 72 of c. 231, Laws of 1917, that every manufacturer of automobiles "engaged in the business of selling the same in this State, or every person or persons or corporation engaged in selling automobiles in this State, the manufacturer of which has not paid the license tax provided for in this section, before selling or offering for sale any such machine, shall pay to the State Treasurer a tax of five hundred dollars and obtain a license for conducting such business." The name of the machine must accompany the application for a license, which must be in writing. A licensee may employ an unlimited number of agents, but each county of the State may levy a tax on each agent. Besides some other provisions, there is one (and it is of special pertinence in the case) "that if any officer, agent, or representative of such manufacturer shall file with the State Treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested" in the bonds of the State or any of its counties, cities or towns, or in property situated therein, and returned for taxation, the taxes named in the section shall be one-fifth of those named. Upon the renewal of a license that shall have been in force less than six months, a rebate of $250 is allowed on the new license.

Two contentions are made by the plaintiffs in error:

(1) That the act imposing the tax offends the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States.

(2) That the act attempts to regulate interstate commerce in contravention of the commerce clause of the Constitution.

The contentions depend upon different considerations. The basis of the first is that the corporations are discriminated against; the basis of the second is that their products are. The contentions, therefore, should not be

confused. They fall under two heads: (1) If the Pennsylvania Corporation and the Indiana Corporation and the Delaware Corporation are doing business in the State, and, therefore, within its jurisdiction, they undoubtedly can complain of a discrimination against them that is offensive to the Fourteenth Amendment. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 415. (2) If, however, they are not in the State and subject to its jurisdiction and seek to enter, the tax may be considered a condition which the statute may impose, (*Paul* v. *Virginia*, 8 Wall. 168, and a number of subsequent cases, including *Southern Ry. Co.* v. *Greene*, *supra*), unless, as plaintiffs in error contend, the tax is a discrimination against their products.

These contentions we will consider in their order, keeping them as separate as possible.

(a) This court has decided too often to need citation of the cases that corporations doing business in a State and having an agent there are within the jurisdiction of the State for the purpose of suit against them, and we may assume that the principle is applicable here and that the Pennsylvania Corporation, the Indiana Corporation and the Delaware Corporation are within the jurisdiction of the State and subject to its laws, equally with the corporations of the State. It will be observed, however, that the act under review applies to all manufacturers and persons engaged in selling automobiles in the State. The act makes no distinctions between non-resident and resident manufacturers. Wherein, then, is there discrimination? It is contended to be in the provision which reduces the tax to one-fifth of its amount—from $500 to $100—if the manufacturer of the automobiles has three-fourths of his assets invested in the bonds of the State or some of its municipalities, or in other property situated therein and returned for taxation. The provision is declared to be impossible of performance and its effect to be that a manufacturer not having such investment of property is

charged $500 for a license and one having such investment of property is charged only $100. And plaintiffs in error, it is asserted, are necessarily in the $500 class. The contrasting assertion is that local manufacturers are in the $100 class, and that, therefore, there is illegal discrimination in their favor.

In explicit specification of such discrimination plaintiffs in error assert that the provision as applied to them is "contrary to all common sense," and that the Supreme Court conceded the improbability of compliance with it by the manufacturer of another State.

The Attorney General of the State seems to concur in the denunciation and adds to it the declaration that the insistence of the act is of an "utterly futile project" but adds, in order to remove or palliate its discrimination, it is as "futile" to manufacturers of the State as to manufacturers of other States, and considers it nugatory. His words are, "from nothing, nothing can arise," and that "discrimination cannot be predicated upon any scheme which is not workable." He therefore dismisses the provision as not applicable.

May we accept his view of it, that is, regard the condition as a mere *brutum fulmen*, imposing no condition or burden, against the decision of the Supreme Court of the State? The court has assumed its efficacy and regarded it as a legal condition upon the Pennsylvania Corporation, the Indiana Corporation, and the Delaware Corporation, doing business in the State. We are unable to concur in this conclusion. It is a perilous power to concede to the State, and it is immediately manifest that it can be exerted to prevent all commerce of those corporations (or other corporations) with the State except as the commerce might be through direct personal purchases and importations. In other words, the power can be exerted to exclude the products of those corporations, and every other corporation, if they have, or it has, agents in the State.

But if that provision can be dismissed as nugatory, as the Attorney General asserts, we encounter the alternative provision which requires the investment of a like proportion of assets of foreign manufacturers in property in the State returned for taxation. In resistance to the assertion that the provision discriminates against non-resident manufacturers, the Attorney General contends that it is as applicable to resident manufacturers as to non-resident manufacturers, and, of course, his inference is that its condition can be performed as easily by one as by the other, and discriminates against neither.

To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State; it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another State, some of its products only at a given time being within the State. Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment, if we assume that the corporations are within the State.

(b) If they are not within the State, their second contention is that the act is an attempt to regulate interstate commerce. If it have that effect it is illegal, for a tax on an agent of a foreign corporation for the sale of a product is a tax on the product, and, if the product be that of another State, it is a tax on commerce between the States. *Welton* v. *Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344; *Darnell & Son Co.* v. *Memphis*, 208 U. S. 113. This is the assertion of plaintiffs in error; defendants in error oppose a denial to the assertion and the denial is supported by the Supreme Court on the authority of *Brown* v. *Houston*, 114 U. S. 622; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304. The basis of the denial and its support by the Supreme Court is that the automobiles had passed out of interstate commerce and had reached repose in the State, and blend with the other things of the

State, and became subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the court that the automobiles were in the hands of the agents of the consigning corporations, and therefore, a tax against them was practically a tax on their importation into the State. It is not necessary to say it would be useless to send them to the State if their sale could be prevented by a prohibitive tax or one so discriminating that it would prevent competition with the products of the State. This is the ruling of the cases which we have cited. It is especially the ruling in *Darnell & Son Co.* v. *Memphis, supra.* The imposition of such a tax is practically the usurpation of the power of Congress over interstate commerce, and therefore illegal.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS dissent.